MUNIANDY & ANOR.

v.

MUHD. ABDUL KADER MUHD. SAHEED & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 12-74-1981]
22 JULY 1987

LANDLORD & TENANT: *Application for vacant possession - Whether defendant rent protected tenants - Ground tenants of plaintiffs predecessors - Tenants at will - Interest of - Credibility and reliability of witnesses - Appeal Court slow to disturb finding of fact - Possession by implication, death, transfer of landlord's reversionary interest - Onus of defendants - Whether there was discharge of that onus.*

The plaintiffs are the present owners of a piece of land on which stands a dwelling house. The defendants are the occupiers of the said dwelling and claim to have been in occupation as rent protected tenants by reason of the fact that they were ground tenants of the plaintiffs' predecessors in title.

This was the defendants appeal from decision of the learned Magistrate giving vacant possession of a portion of that land upon which stood the dwelling house occupied by them.

The sole question for determination was whether the defendants occupied the premises as trespassers or as tenants.

Held:

[1] The defendant did not discharge their onus to prove the facts which would entitle them to the protection which they claimed. It was not for the plaintiffs to prove a negative.

[2] The High Court must not merely entertain doubts as to the corrections of the decision below but must be convinced that it is wrong. In this case, there was no reason to dissent from the conclusions arrived at by the learned Magistrate.

[3] On the facts adduced in the Court below, it was not possible to conclude that there was a relationship of landlord and tenant as between the plaintiffs and the defendants.

[Appeal dismissed with costs.]

Cases referred to:
Antonio Dias Caldeira v. Frederick Augustus Gray [1936] MLJ 137
Saraswathy Ammal & Anor. v. Oriental Bank of Malaya Ltd. [1960] MLJ 8
Doe d Stanway v. Rock [1842] Car & M 549
Disdale v. Ilies [1673] 2 Lev 88
Mary Ng v. Singapore Improvement Trust [1954] MLJ 31
Chow Yee Wah & Anor. v. Choo Ah Pat [1978] 2 MLJ 41

Legislation referred to:
Evidence Act 1950, s. 101

For the appellants - Nararetnam (Sithambaran with him); M/s. Chang & Vello
For the respondents - Abu Haniffa; M/s Syarikat Abu Haniffa

JUDGMENT

Edgar Joseph Jr. J:

This was a defendants' appeal from the decision of the learned Magistrate giving vacant possession of a portion of certain land comprised in Holding No. 18 Town Subdivision 9W, North East District, Penang ("the land") upon which stood a dwelling house occupied by them ("the premises").

Both in the Court below and before me the sole question for determination was whether the first and second defendants, who were son and mother respectively, occupied the premises as trespassers or as tenants. The defence claimed that they were rent protected tenants by reason of the fact that they were ground tenants of the plaintiffs' predecessors in title.

The following facts were found by the learned Magistrate:

(1) that some time in 1974, the plaintiffs had purchased the land on a portion of which stood the premises.

(2) that the premises had been built by one Koniah, the father of the first defendant and the husband of the second defendant, during the Japanese occupation of this country and so were subject to the provisions of rent control legislation.

(3) that the defendants had been occupying the premises without the consent of the plaintiffs and indeed had never even offered to pay rent to the plaintiffs.

(4) that ground rent had not been paid by the defendants to the plaintiffs' predecessors in title and

(5) that it was not even proved that the defendants had occupied the portion of the land concerned with the consent of the plaintiffs' predecessors in title.

Having regard to her findings aforesaid, the learned Magistrate whilst recognising that it was in the defendant's favour that they were in possession concluded "it was not possible for the Court to conclude that there was a relationship of landlord and tenant between the defendants and the previous owner, and consequently that the plaintiffs took the land subject to that interest".

It was manifestly clear from a perusal of the record of appeal that the learned Magistrate's decision depended upon the view she took as to the credibility and reliability of the defendant and that her assessment of their credibility and reliability was the decisive consideration. However, in arriving at her findings as to their credibility and reliability, she did not rely on demeanour alone but, quite correctly, balanced those factors against the rest of the evidence and the probabilities of the case.

In these circumstances, an Appellate Court guided as it is by the printed record will be slow to interfere with the decision of the Court below on a question of fact. Indeed, in *Antonia Dias Caldeira v. Frederick Augustus Gray* [1936] MLJ 137, it was laid down by their Lordships of the Privy Council that in an appeal from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of appeal must, in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

It was wrongly argued that the finding of the learned Magistrate that the defendants had not proved that they had occupied the premises with the consent of the previous owner was unreasonable as the defendants had been in occupation for more than 40 years. It was

further argued that there was evidence that the defendants had paid the previous owner rental at the rate of RM3 per head during the Japanese occupation and that this established the relationship of landlord and tenant. Lastly, it was contended that the learned Magistrate had misdirected herself as regards the onus of proof; in particular, it was urged that she had failed to appreciate that the onus of proof was not on the defendants to show that they were tenants but upon the plaintiffs to show that the defendants were trespassers.

Now, if contrary to the learned Magistrate's finding of fact, the defendants had been occupying the premises with the consent of the previous owner, but without paying rent, they could not have claimed the protection of rent control legislation, for they would then be tenants at will. See *Saraswathy Ammal & Anor. v. Oriental Bank of Malaya Ltd.* [1960] MLJ 8. Since a tenant at will has no certain estate, his interest is determinable simply by a demand for possession or by implication of law from other acts or events, such as the death of either party (see *Doe d Stanway v. Rock* [1842] Car & M 549) or the transfer of the landlord's reversionary interest with notice to the tenant (*Disdale v. Ilies* [1673] 2 Lev 88).

There was, in this case, a notice to quit in writing of one month's duration served upon the defendants which was, of course, more than sufficient to determine a tenancy at will. Indeed, if the defendants were merely tenants at will, the mere bringing of ejectment proceedings would be sufficient to determine such tenancy.

Clearly, therefore, the question central to this appeal was whether there was evidence that the defendants had paid any rent to the plaintiffs' predecessors in title or any of them.

I shall now proceed to examine the evidence relevant to this question.

The plaintiffs themselves having acquired title only in 1974 were in no position to testify from personal knowledge as to whether the defendants had been paying any rent to the previous owners. Only one of them - Muhd Abdul Kader - had testified and he could only say that they had neither received any rent from the defendants nor consented to their occupation of the land or the premises. On the other hand, the defendants were very far from being disinterested witnesses and bias or interest is clearly of importance in estimating the weight of evidence.

Having made these general observations I now turn to examine the evidence of the defendants in detail.

I shall take, first of all, the testimony of the first defendant who was aged 51 years at the time he testified and so must have been a lad of 12 to 16 years during the Japanese occupation of this country.

In the first place, he testified that the premises known as 29, Singgora Lane, into which he had moved when he was aged 20, had been built by his father during the Japanese occupation but that his father had died in September 1974 as appeared from a certified copy of the death certificate, being Exhibit D5.

In the second place, he testified that he had been paying ground rent to one Arumugam Pillai the previous owner. However, under cross-examination, he admitted that he had never paid any rent for the premises. But then, in re-examination, he attempted to explain this contradiction by saying that he had made a slip when he said that he had paid no rent at all, that in fact, he had paid rent to Arumugam Pillai. He produced no rent receipts nor was he able to produce a letter from Arumugam Pillai which he said permitted him to occupy the land as he claimed he had lost it.

I might add, in passing, that Arumugam Pillai although available, was not called to testify and the second defendant had, in fact, admitted that after the Japanese occupation rent was not paid. An attempt to explain this admission did not commend itself to the learned Magistrate.

In these circumstances, it is hardly surprising that the learned Magistrate was not prepared to rely upon the testimony of the first defendant for she found that ground rent had not been paid to the previous owner nor had it been proved that the defendants had occupied the land with the consent of the previous owner. She observed nor had the letter mentioned by the first defendant been produced.

I shall next take the testimony of the second defendant who the learned Magistrate considered "a truthful witness for the most part".

It is true that the second defendant did testify, though only under cross-examination, that "during the Japanese occupation the owners collected rental of RM3 per head". Clearly, this evidence, if accepted by the learned Magistrate, would have been sufficient to establish that the second defendant at least (for she then occupied the premises with her deceased husband Koniah) was a rent protected tenant. But, it is implicit in the judgment of the learned Magistrate that she did not accept this evidence, for otherwise she would scarcely have found (1) "that ground rent had not been paid even to the previous owner" and (2) that "it was not possible for the Court to infer that there was a relationship of landlord and tenant between the defendant and the previous owner and consequently, that the plaintiffs took the land subject to that interest". Further support for this view may be derived from the learned Magistrate's subsequent finding (made soon after she found that ground rent had not been paid even to the previous owner) that she considered the second defendant "a truthful witness for the most part and accept her earlier testimony that ground rent was never paid after the Japanese occupation ...". (Emphasis added). It follows, therefore, that the learned Magistrate was not prepared to rely on the whole of the evidence of the second defendant; most particularly, she was not prepared to accept that part of the testimony alleging the payment of rent at the rate of RM3 per head during the Japanese occupation. On any other view, the final conclusion of the learned Magistrate that "the Court cannot find on the available evidence that there was such a relationship" - the relationship of landlord and tenant, I would interpolate - "between the plaintiffs and the defendants ... They are in fact trespassers" would be inexplicable.

The defendants had claimed the protection of rent control legislation. It was their case that the premises had been built by Koniah with the consent of the then owner and that rent had been paid to the latter and subsequently to Arumugam, although thereafter they did not pay rent to the plaintiffs nor had they their consent to occupy the premises. In my opinion, in these circumstances, the onus was upon the defendants to prove the facts which would entitle them to the protection which they claimed. (See *Mary Ng v. Singapore Improvement Trust* [1954] MLJ 31, 33 col. 1).

The facts upon which the defendants relied as entitling them to protection from eviction were peculiarly within their knowledge and it was for them to prove those facts: see s. 101 Evidence Act 1950. It was not for the plaintiffs to prove a negative.

In the event, the learned Magistrate who saw and heard the defendants testify, and, weighed all the evidence, had concluded that they failed to discharge the onus aforesaid. Now, there are various aspects of such evidence in respect of which the Trial Court can get the "feeling" of a case in which an Appellate Court, reading the cold print of the record, cannot. Moreover,

the disadvantages under which an Appellate Court labours in weighing oral evidence when all it has to rely on is a Magistrate's notes of the evidence, an incomplete record, as compared to when it has a verbatim transcript, are wellknown (per Lord Fraser in *Chow Yee Wah & Anor. v. Choo Ah Pat* [1978] 2 MLJ 41, 42 col. 1 A, B.

It is not for me, therefore, sitting on appeal, to say whether, had I tried the case, I would have come to a different conclusion for that would be beside the point. The true question is whether the appellants have persuaded me "not merely to entertain doubts as to the correctness of the decision below but to be convinced that it is wrong" (per Lord Alness in *Antonio Dias Caldeira v. Frederick Gray* (*ibid*). Applying this test, I saw no reason to dissent from the conclusions arrived at by the learned Magistrate.

In the result, the appeal was dismissed with costs.

Also found at [1990] 1 CLJ 939